

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL NEWAGO, JR.,

Petitioner,

ORDER

v.

07-C-0091-C

GREG GRAMS, Warden,  
Columbia Correctional Institution,

Respondent.

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This petition for a writ of habeas corpus under 28 U.S.C. § 2254 is before the court for report and recommendation. Michael Newago, Jr., an inmate at the Columbia Correctional Institution, challenges his March 19, 2004 conviction in the Circuit Court for Bayfield County for several controlled substance offenses, intimidating a witness and bail jumping. In an order entered February 22, 2007, this court directed the state to respond to the following claims:

- 1) the trial court's admission of a statement by a deceased witness violated petitioner's right to confrontation guaranteed by the Sixth Amendment;
- 2) the trial court abused its discretion in allowing the state to present evidence of petitioner's prior convictions;
- 3) the combination of these two errors deprived petitioner of his right to a fair trial;
- 4) the evidence presented at trial was insufficient to support a conviction for possession of cocaine with intent to deliver;
- 5) petitioner's trial lawyer was ineffective for failing to request a cautionary instruction concerning the prior convictions; and

6) the prosecutor made inflammatory comments during rebuttal that prejudiced petitioner's ability to receive a fair trial.

In its answer, the state alleges that petitioner has procedurally defaulted all of his claims except claims 3 and 4. The state's allegation consists of a bald assertion with no explanation why most of petitioner's claims are procedurally defaulted. In addition, the state has violated this court's order to show cause by failing to address the issue of cause and prejudice. Order, Feb. 22, 2007, dkt. #3, at 2 ("The state must address the issue of cause and prejudice in its supporting brief"). With respect to the claims that the state concedes are not procedurally defaulted, the state offers only the conclusory assertion that "the decision of the Wisconsin Court of Appeals is not contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, nor was the state court's determination of the facts unreasonable in light of the evidence."

This court does not impose substantial burdens on the state in habeas corpus cases. It does not require the state to submit a separate brief in support of its response to the petition but instead allows the state to incorporate legal arguments in its responsive pleading. However, in spite of the court's willingness to permit truncated submissions, when ordered to respond to a habeas petition the state still bears responsibility to show why the writ should not issue. The state's shorthand allegations in this case fall short of meeting that burden. Particularly troubling is the state's failure to offer even a single explanatory statement in support of its contention that four of petitioner's six claims are barred by the doctrine of procedural default. Although this court is capable of discerning the rationale

behind the defense from reviewing the state court record, the court should not have to conduct its own research or develop theories on the state's behalf. *See United States v. Turcotte*, 405 F.3d 515, 536 (7th Cir.2005) (“[U]nsupported and undeveloped arguments are waived.”). What's more, perfunctory responses like that submitted by the state in this case are unfair to petitioners, who unlike the court are not necessarily familiar with federal habeas law. Indeed, petitioner's amendment to his reply (dkt. #10, in which petitioner asks for permission to delete his “unexhausted” claims) suggests that petitioner in this case may not understand the basis for the state's invocation of the procedural default defense.

Rather than deem the state to have waived its opportunity to respond meaningfully to the petition, I will give it the opportunity to file an amended answer that more thoroughly develops the basis for the state's procedural default defense and its position that the state court's findings and conclusions on the non-defaulted claims are reasonable under 28 U.S.C. § 2254(d). The state shall have until May 24, 2007 in which to submit its amended response. Petitioner shall have until June 13, 2007, in which to submit a reply to the amended response.

One final matter must be addressed. Petitioner has filed a motion for the appointment of counsel to assist him in formulating his reply. Although I find that petitioner is indigent for the purpose of retaining an attorney to assist him, I am denying petitioner's motion. When considering a request by an indigent civil litigant for the appointment of counsel, the court must consider the difficulty of the case in relation to the petitioner's ability to represent himself, and whether counsel might make a difference to the

outcome. *See Farmer v. Haas*, 990 F.2d 319, 322 (7th Cir. 1993). Having reviewed the file and the issues in this case, I am convinced that the appointment of counsel will not make a difference. I anticipate that the state's procedural default defense is based upon petitioner's failure to present all but claims 3 and 4 to the Wisconsin Supreme Court in his petition for review. That petitioner did not present his other claims to the state supreme court is not debatable and not likely to be excused for cause. *See Anderson v. Cowan*, 227 F.3d 893, 901 (7th Cir. 2000) (because petitioner had no constitutional right to counsel for discretionary petition to state supreme court, counsel's failure to raise claim in petition to state supreme court did not constitute cause). Therefore, the appointment of counsel would be of little benefit to petitioner insofar as the procedural default defense is concerned.

As for the merits of the claims that petitioner did properly exhaust, the record already contains arguments on petitioner's behalf made by petitioner's state court appellate lawyer to the state supreme court. Although those arguments do not address directly whether the state court of appeals' conclusions were "reasonable" under § 2254(d), they do address that issue indirectly insofar as petitioner argued that the state court of appeals had erred. This court will consider those arguments, as well as any arguments petitioner presents in his reply, when determining whether the court of appeals reasonably applied clearly established Supreme Court law in arriving at its conclusions. Finally, petitioner's submissions thus far, although prepared by a non-lawyer, demonstrate that he is capable of presenting his points cogently and persuasively. Overall, given this court's familiarity with the case law, the rules governing federal habeas and its commitment to interpreting *pro se* submissions liberally, I

am convinced that the appointment of counsel will not make a difference to the outcome in this case.

ORDER

IT IS ORDERED that the state has until May 24, 2007, in which to submit an amended response to the petition in accordance with this order. Petitioner has until June 13, 2007 in which to submit a reply.

Petitioner's motion for the appointment of counsel is DENIED.

Entered this 14th day of May, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER

Magistrate Judge